

# EXHIBIT M

1 SUPREME COURT OF THE STATE OF NEW YORK  
2 COUNTY OF NEW YORK - CIVIL TERM: PART 48

3 -----X  
4 NORTH STAR DEBT HOLDINGS, LP, SILVER OAK  
5 CAPITAL, LLC, AG CREDIT SOLUTIONS NON-ECI  
6 MASTER FUND, AG CENTRE STREET PARTNERSHIP, LP,  
7 AG SUPER FUND MASTER, LP, and GAMUT CAPITAL  
8 SSB, LLC,

9 Plaintiffs,

INDEX NO.

10 - against -

11 SERTA SIMMONS BEDDING, LLC, ADVENT  
12 INTERNATIONAL CORPORATION, EATON VANCE  
13 MANAGEMENT, INVESCO SENIOR SECURED MANAGEMENT,  
14 INC., CREDIT SUISSE ASSET MANAGEMENT, LLC,  
15 BOSTON MANAGEMENT and RESEARCH, BARINGS LLC,  
16 and Does 1-50,

17 Defendants.

18 -----X

19 Skype Proceedings  
20 November 30, 2020

21 B E F O R E:

22 THE HONORABLE ANDREA MASLEY, Justice

23 A P P E A R A N C E S:

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23 William Cardenuto  
24 Senior Court Reporter  
25

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1 2:31 p.m.

2 THE COURT: Hi. Good afternoon. In the matter  
3 of North Star Debt Holdings LP against Serta Simmons  
4 Bedding. I see the court reporter is here as well as one  
5 or two other people including some students from CUNY Law  
6 School's New York practice class. So I'll ask you to keep  
7 that in mind when you're speaking, and if you can take a  
8 moment to help out our students, I would appreciate it.  
9 It's 2:31. I'm going to ask each party to have one  
10 speaker and have that one speaker put everyone's  
11 appearance on the record, and I would ask that everyone  
12 turn off their microphones unless they are speaking.  
13 Okay. So who do we have representing North Star Debt  
14 Holdings LP and the plaintiffs?

15 MR. CLAYTON: Your Honor, Lewis Clayton from  
16 Paul Weiss. I think I will be our one speaker, and my  
17 colleagues Andrew Ehrlich and Ryan Rizzuto of Paul Weiss  
18 are also with me. I think we also have a representative  
19 from the Friedman Kaplan firm.

20 THE COURT: Okay. Can I have that attorney make  
21 an appearance, please, from Friedman Kaplan.

22 MS. BEAUMONT: Hello, your Honor. This is Anne  
23 Beaumont from Friedman Kaplan.

24 THE COURT: And for defendants who is going to  
25 be speaking?

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1 MR. LENDER: Your Honor, this is David Lender  
2 from Weil Gotshal on behalf of the company Serta Simmons  
3 Bedding LLC, and I'll be speaking on behalf of the  
4 company, and I believe I have on as well my colleague,  
5 Luna Barrington, also Weil Gotshal.

6 THE COURT: Okay. And then we have the lender  
7 defendants.

8 MR. MASTRO: Randy Mastro, Gibson, Dunn and  
9 Crutcher on behalf of the lender defendants. While I have  
10 colleagues with me as well, I will be doing the  
11 speaking.

12 THE COURT: Okay. Thank you.

13 MR. MCCAUGHEY: Your Honor, if I may, this is  
14 Dan McCaughey from Ropes and Gray on behalf of Advent.

15 THE COURT: Let's finish with Advent, and who is  
16 with you?

17 MR. MCCAUGHEY: Logan Pettigrew also from Ropes  
18 and Gray.

19 THE COURT: Thanks. And I heard someone else  
20 wanted to make an appearance.

21 MS. PRIMOFF: Yes, your Honor. Madlyn Primoff  
22 from Freshfields, Bruckhaus and Deringer US LLP on behalf  
23 of Defendant Barings.

24 THE COURT: Thank you. Anyone else before we  
25 all turn our microphones off and we hear from the

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1 plaintiffs on their motion to discontinue the action? No?

2 Thank you.

3 Mr. Clayton.

4 MR. CLAYTON: Thank you very much, your Honor.

5 We appreciate the Court's time today in particular under  
6 these circumstances. Under CPLR 3217 a motion for  
7 discontinuance without prejudice, which is this motion, is  
8 to be granted absent a showing of prejudice by the  
9 defendants. We quoted a number of authorities in our  
10 papers. The First Department said it in Bank of America.  
11 "Absent special circumstances such as prejudice to adverse  
12 parties a discontinuance should be granted." There is no  
13 cognizable prejudice here. The case is still at its very  
14 earlier stage. Our motion to discontinue without  
15 prejudice was made, by my count, 29 days after the  
16 complaint was filed. I think the complaint was filed on  
17 June 11th. The motion was made on July 10. There's been  
18 no discovery. We've gotten one or two pieces of paper,  
19 and I'm speaking literally there, from the defendants.  
20 There's been no document production.

21 THE COURT: Right. But we had quite a bit of  
22 paper on the motion for the injunction; right?

23 MR. CLAYTON: That's what we had, your Honor.  
24 What we had was those -- that preliminary ruling by the  
25 Court on our request for injunctive relief, and there's

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1 cases, and we've cited them, where discontinuance occurs  
2 even after those kinds of preliminary rulings. The really  
3 question is whether there is prejudice here to the  
4 defendants based upon what has happened so far, and I  
5 would submit that at the earliest stages of the case, and  
6 this is an early stage of the case, because as I'll say --

7 THE COURT: I'm going to interrupt, Mr. Clayton.  
8 This is Motion 11. You know, it's kind of hard to --

9 MR. CLAYTON: Well, I'll tell you why. Your  
10 Honor, look, I accept that and I invite the Court's  
11 questions, and I want to explain why I say it's at the  
12 early stage.

13 THE COURT: I'm sorry. Somebody has got to turn  
14 off their microphone, because I'm hearing typing, very  
15 fast.

16 MR. CLAYTON: We don't know how accurate.

17 THE COURT: Go ahead, Mr. Clayton.

18 MR. CLAYTON: Your Honor, here's why I say it's  
19 at the early stages, because if the motion to discontinue  
20 without prejudice is denied, we're going to be filing an  
21 amended and supplemental complaint. There's a stipulation  
22 we've entered into with the defendants. That complaint is  
23 due 14 days after the Court's ruling on this motion. This  
24 case is going to be much broader and deeper and longer if  
25 it proceeds here than what has happened so far, and none

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1 of the arguments -- the plaintiffs have to establish some  
2 prejudice from the fact that the case will continue, and  
3 let me tick off the arguments that I understand that they  
4 are making as to prejudice, because we believe none of  
5 those arguments amount to prejudice under the case law or  
6 under 3217. The first argument is, well, if there's a  
7 discontinuance without prejudice here, there may well be  
8 later litigation. That's true, but that is not prejudice  
9 under the CPLR. If that was prejudice, then very few, if  
10 any, motions to discontinue without prejudice would be  
11 granted, because the discontinuance without prejudice --  
12 the without prejudice part of that ruling is exactly to  
13 allow the plaintiff to reinstitute litigation. So that is  
14 not prejudice that is counted -- that makes a difference  
15 under 3217, and as I said, we will be filing, if the  
16 motion is denied, an amended and supplemental complaint.  
17 We submitted to your Honor some of the papers in the  
18 federal court action. We really submitted them, because  
19 they indicate some of the issues that will arise in this  
20 case and are now being litigated in the federal court.  
21 The motion to dismiss in the federal court is fully  
22 briefed, and it will be argued, I think, on January 14, if  
23 I have the date correct. I think that is correct, and  
24 unless that case is dismissed, that litigation will  
25 continue. It is obviously proceeding right now. So the



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1 defendants are in litigation right now in the federal  
2 court on this transaction. We didn't file the litigation  
3 in federal court, and we're not prosecuting the litigation  
4 in federal court. If the motion is denied, we will file  
5 our amended and supplemental complaint. They will not be  
6 free of litigation. They will have a second litigation.  
7 So, yes, they argue that, well, we prepared our papers in  
8 opposition to the preliminary injunction motion. Again,  
9 that is not prejudice to them. We sought injunctive  
10 relief. We had to seek it on an emergency basis. We did  
11 not know that there are some significant details of the  
12 transaction. We did not know when that motion was  
13 briefed. Some of them have come out now. Some of them  
14 create additional claims and additional reasons why we  
15 think that transaction was improper. So to say, for  
16 example, well, we spent a lot of time on the preliminary  
17 injunction motions, that is an investment that's been  
18 made. Frankly, it's an investment that paid off for the  
19 defendants, because they successfully defeated our request  
20 for injunctive relief, but having spent that money is not  
21 prejudice. Quoting the First Department, the Eugenia  
22 case, in our reply papers at Page 7, "Delay, frustration  
23 and expense in preparation of a contemplated defense do  
24 not constitute prejudice warranting denial of a motion for  
25 voluntary discontinuance." Now, the next argument they

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1 make, I suppose the argument they make with the greatest  
2 vigor if you look at adjectives or repetition, you know,  
3 the usual measures of lawyerly vigor on paper, is the  
4 argument that we're avoiding a motion to dismiss that has  
5 been filed on the current complaint. We're not avoiding a  
6 ruling on that motion, because I respectfully submit there  
7 will be no ruling on that motion, because if the case  
8 continues, what will happen is we're going to file an  
9 amended and supplemental complaint. If they choose to  
10 move to dismiss that amended and supplemental complaint,  
11 that will be the pleading that the Court considers, not  
12 the current pleading, and that case, that amended and  
13 supplemental complaint which creates that case will be  
14 materially different from the case here, and one reason  
15 that we submitted the federal papers to your Honor was to  
16 tick off some of the points that are already being raised.  
17 Let me give you one example, and I'm simply here giving  
18 examples of what is being alleged in the federal case, and  
19 I think it shows that the case, as it appeared on that  
20 motion for a preliminary injunction, is actually far less  
21 complex than the case will be going forward. I'm in no  
22 way criticizing the Court's ruling. A motion, as your  
23 Honor knows, a TRO and a preliminary injunction done on a  
24 very quick basis, we didn't have full information. That  
25 is the nature of the beast. So let me give you one

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1 example. As the defendants have made clear, their  
2 argument is that this transaction was appropriate, because  
3 it was based on an exchange of debt which they say  
4 qualified as an open market purchase under the credit  
5 agreement, and your Honor mentioned that argument and  
6 found no likelihood of success, as I read your Honor's  
7 opinion, in significant measure on that basis. There was  
8 no briefing of any significance. There was no evidence  
9 taken on the question of what is an open market purchase.  
10 Well, if you look at the federal papers in this case, if  
11 you look at the opposition to the motion to dismiss filed  
12 by the plaintiffs in federal court, they have a section,  
13 Pages 10 to 13, talking about open market purchase, and  
14 they argue, and one could argue that they argue with great  
15 force and great persuasion, that this was not an open  
16 market transaction, a phrase not denied in the complaint,  
17 and there's one piece of evidence that they put in which  
18 is very interesting here. It's on Pages 19 and 20 of  
19 their opposition brief. It is a quote from the Weil  
20 Gotshal law firm who is representing some of the  
21 defendants here, and there's a client alert issued in  
22 March of 2009 which is on the Weil Gotshal website as we  
23 speak, still there, and it talks about exactly this kind  
24 of transaction and exactly what an open market purchase is  
25 in connection with the transaction. We didn't submit --

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1 we submitted the brief to your Honor. We certainly can  
2 submit the Weil Gotshal private equity alert. It's also  
3 available right on the web, and what's it about? It's  
4 entitled "Deleveraging Portfolio Companies Through Debt By  
5 Facts," exactly what happened here. Then Weil Gotshal has  
6 a description of what an open market purchase is. It's on  
7 Page 20.

8 THE COURT: Yeah. I'm going to interrupt you on  
9 what Weil Gotshal thinks about open market purchases. I  
10 get your point that the complaint in the federal court has  
11 a bit more detail. Are there any other arguments or  
12 prejudices that the defendants raise that you want to  
13 address?

14 MR. CLAYTON: Yes, I do, but I just, if I may,  
15 would like to come back to just one second to this  
16 question of open market purchases, because the idea that  
17 this case goes on a motion to dismiss just on the basis of  
18 what is in the last complaint, if that is the idea that  
19 defendants have in mind when they say we're just trying to  
20 avoid a ruling on a motion to dismiss that original  
21 complaint, I think that is fundamentally misguided,  
22 because if you look at the factors here, if you look at  
23 that definition of open market purchases, it does -- if  
24 that definition is right, it doesn't fit. So let me go  
25 onto the other arguments. The other arguments are --

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1 THE COURT: You're trying to avoid me. That is  
2 really the big one.

3 MR. CLAYTON: Well, yes, but that's the one I'm  
4 kind of addressing, your Honor. Here's what is happening.  
5 There is going to be a ruling in the federal court on the  
6 motion to dismiss. If we want to press our claim, they  
7 are saying -- first of all, your Honor, we're not -- we're  
8 not -- I would tell you we're not trying to avoid you.

9 THE COURT: I won't take it personally. With  
10 440 cases, I don't have a problem.

11 MR. CLAYTON: I did not think so. They say  
12 we're doing the avoid Justice Masley argument is, you  
13 know, comes in two flavors; one is called forum shopping,  
14 and the other is judge shopping. We're not shopping at  
15 all. We're not forum shopping because --

16 THE COURT: So then why discontinue the action  
17 and not just ask for a stay pending the federal action?

18 MR. CLAYTON: Let me tell you why. First of  
19 all, I just want to go into our reasons, but I simply  
20 hasten to add that under the rules, we don't have to state  
21 a reason, but we have very significant reasons. Here are  
22 the reasons. There's three basic reasons. One is we want  
23 to see what develops with the company's own finances.  
24 This case is about our position in the capital structure.  
25 We want to see what happens with Serta. That's point one.

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1 Point two, one of the arguments that they raise -- the  
2 defendants have raised in their motion, and they have  
3 raised in the federal case, we think it's a misplaced  
4 argument. We think it's wrong, but one of their arguments  
5 is the administrative agent and not us has the right to  
6 bring this case. Indeed, in the motion to dismiss our  
7 original complaint, the lender defendants, I think, on  
8 Page 21 chide us for not interacting with the agent.  
9 Well, we are interacting with the agent. We may have to  
10 have the agent replaced. We have dialogue with the agent  
11 that is moving. Now, I want to make clear what we're  
12 trying to do is clear away the underbrush. We do not  
13 believe -- and I'm happy to get into the merits of that  
14 issue, but I don't think now is the time. We don't  
15 believe that the agent has the right to bring the claims  
16 that were alleged here, but we want to clear away that  
17 issue. That's the second ground, and the third ground is  
18 we do want to see what happens with the federal case,  
19 because the federal case is moving. There will be a  
20 ruling in the federal case that will affect what is going  
21 on here, but, again, the question is not why do we want to  
22 do this. The question is what is the prejudice, and let  
23 me come back to the forum shopping and the judge shopping.  
24 Forum shopping is when you go into another store. We're  
25 only in one store, your Honor. It is your store. We're

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1 not in the federal court store. We didn't open the door  
2 and walk in. Someone else did. So we're not forum  
3 shopping, and we're not judge shopping, because if we are  
4 allowed to discontinue without prejudice, and we file  
5 again, the case will be marked as related, and we have  
6 said in our papers, and I say it again, that we will -- we  
7 understand that that case, if you'll have us, your Honor,  
8 is coming back to you. So we're not forum shopping, and  
9 we're not judge shopping, and also, the implication is we  
10 are fearful -- we're terribly fearful that you will  
11 immediately act on our original complaint and dismiss our  
12 case. I suppose that's why they say we're frantically  
13 shopping in another courthouse or for another judge. We  
14 are not, and we don't think -- because this case is going  
15 to change when any amended and supplemental complaint is  
16 filed, we don't fear that, and interestingly, if the  
17 defendants think that their arguments, and they have a lot  
18 of rhetoric in their pleadings about how dare we move to  
19 discontinue, if they are so sure of their position, then  
20 I'm certain that Judge Daniels will recognize the virtue  
21 of their arguments. He will dismiss their case, and they  
22 will have even a stronger position, and they will make it  
23 even less likely that we refile our complaint. So the  
24 argument that they are somehow prejudiced by forum  
25 shopping or judge shopping is incorrect.

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1 THE COURT: Okay.

2 MR. CLAYTON: Now, I think, your Honor, those  
3 are, as I see it, the significant arguments that they  
4 make. They wasted money on the preliminary injunction.  
5 It doesn't work.

6 THE COURT: I'm just going to interrupt you,  
7 because I am a little pressed for time. I have another  
8 case at 3:30, and I want to make sure everyone has an  
9 opportunity. So who is going to speak first for the  
10 defendants? Mr. Mastro?

11 MR. MASTRO: Yes.

12 THE COURT: And I'm going to ask everyone else  
13 to turn off their microphones.

14 MR. MASTRO: Technical assistance, your Honor.  
15 I'm going to cut right to the heart of the matter, because  
16 I heard some extraordinary things there. We have an  
17 expression here in New York for Mr. Clayton's argument.  
18 It's called "chutzpa." This is incredible, your Honor.  
19 He just acknowledged --

20 THE COURT: I think that goes a little bit too  
21 far. I have seen chutzpa. I'm sorry, Mr. Mastro. I  
22 don't agree with you.

23 MR. MASTRO: Let me explain why I say that, your  
24 Honor, because this is, your Honor, to paraphrase some  
25 words I heard earlier, this is about trying to avoid you.



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1 This is about blatant --

2 THE COURT: The problem I have with that  
3 argument, Mr. Mastro, I appreciate it, but that's  
4 prejudice to me. That's not prejudice to you. What's  
5 your prejudice?

6 MR. MASTRO: It's absolutely both a prejudice to  
7 the Court and to us, because you've already invested  
8 substantial time and resources in this case as have --

9 THE COURT: But you see -- I'm sorry to  
10 interrupt. The argument was procedurally incorrect,  
11 because as Mr. Clayton pointed out, he's right, if this  
12 case is refiled in New York County, then it's coming back  
13 to me. Whether I want it or not, it's coming back.

14 MR. MASTRO: Your Honor, with all due respect.

15 THE COURT: Of course I want it back. I just  
16 love having you all before me.

17 MR. MASTRO: I would love for that to be the  
18 case, but, your Honor, it's actually not the case when one  
19 reads the related case law, and I have had experience  
20 litigating it. If there's no case pending before you, the  
21 case doesn't actually get assigned to you, whether he  
22 wants to check the box or no, because the rule relates to  
23 there has to be a pending case. So this will not go to  
24 you. It will necessarily go to someone else even if Mr.  
25 Clayton, I would take his word that he would check the

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1 box, even if he checked the box, it wouldn't go to you  
2 directly. It would go to another judge, and then we  
3 have --

4 THE COURT: Mr. Mastro, I would, if I were to  
5 grant this motion, grant it on condition, which I am  
6 allowed to do, which is, given your objection, that it  
7 would be refiled and assigned to me again.

8 MR. MASTRO: Well, your Honor, I appreciate  
9 that, but the literal words of the rule, and as it has  
10 been applied, including, unfortunately, in another case in  
11 which I was involved, the case was on appeal at the time,  
12 and the administrative justice, you know, ruled that the  
13 case should not -- the related case should not have gone  
14 to the other judge.

15 THE COURT: Uh-huh.

16 MR. MASTRO: Your Honor, it doesn't actually go  
17 back to you.

18 THE COURT: You're saying that it would be  
19 randomly assigned.

20 MR. MASTRO: That's correct, your Honor. I  
21 think if your Honor reviews the rule, and I'll be happy to  
22 submit the administrative order in the case in which I was  
23 involved --

24 THE COURT: I read that case actually.

25 MR. MASTRO: A black car assistance corporation

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1 case. Judge Engoron took the case, and you know, the  
2 administrative judge, Justice Heitler, said it never  
3 should have gone to you in the first place; it should have  
4 never gone to the judge. It never got back to Justice  
5 Engoron. I don't want to get --

6 THE COURT: Again, you know, that's still not  
7 prejudice to you. That's my work, you know, in getting up  
8 to speed on the case, not yours, and also, the preliminary  
9 injunction, if I were to deny the motion to discontinue  
10 the case today, you would be going forward with this case,  
11 and you have spent the time and the money on the  
12 preliminary injunction either way. If you win today, you  
13 spent the money and the time on the preliminary  
14 injunction. It's not a cost that you would have avoided  
15 if they hadn't filed this motion.

16 MR. MASTRO: Your Honor, games are not only  
17 played with you. They are being played with us. We have  
18 now five months of delay that Mr. Clayton has effected.

19 THE COURT: So he didn't file this 30 days after  
20 filing the motion -- filing the action?

21 MR. MASTRO: He did file it within the number of  
22 days of filing the action after we had the most incredible  
23 litigation activity, after we had, you know, fire drill  
24 after fire drill. All of us had that fire drill, your  
25 Honor, and I don't think -- your Honor, we would not be

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1 here right now if your Honor had granted them preliminary  
2 injunction, if your Honor had found they were likely to  
3 succeed, if your Honor found certain of their claims  
4 instead of the other way around, were likely to survive  
5 dismissal than likely to be dismissed like the implied  
6 covenant claim.

7 THE COURT: The standard was likelihood of  
8 success. I wasn't deciding a motion to dismiss at that  
9 point.

10 MR. MASTRO: I understand, your Honor, but Mr.  
11 Clayton, acting in concert with other similarly situated  
12 lenders like LCM which was before your Honor or trying to  
13 get before your Honor and trying to intervene, and then  
14 just before your Honor ruled and then drops out and goes  
15 into federal court. Mr. Clayton admitted --

16 THE COURT: I'm sorry. Hold on, please.

17 (Pause.)

18 THE COURT: I'm sorry, Mr. Mastro. Go ahead.

19 MR. MASTRO: Mr. Clayton admitted it to you.  
20 This has all been about, you know, in coordination  
21 with LCM in the federal case wanting to see what happened  
22 in the federal case, delaying this case.

23 THE COURT: How does that prejudice you?

24 MR. MASTRO: It completely prejudices us, your  
25 Honor, because I find it incredible that he's in here

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1       arguing to you, don't worry about it, there's going to be  
2       a federal decision now sometime after mid-January, when we  
3       could have been fully briefed and have had a motion to  
4       dismiss decided in this case well before then. He's  
5       hoping -- this is blatant forum shopping and judge  
6       shopping. He's hoping in the other forum he might get  
7       some better relief through his surrogate litigant, LCM,  
8       and your Honor that's prejudice to you and to us that we  
9       are going through this.

10               THE COURT: The standard is prejudice to you.  
11       It's not prejudice to me.

12               MR. MASTRO: I understand, your Honor, but we  
13       have been prejudiced by the gamesmanship. We've been  
14       prejudiced by the fact that they did this to avoid an  
15       adverse -- a timely adverse ruling by you on motion  
16       practice so they could string things out to get into the  
17       federal court, and now we're having to brief the federal  
18       court and then eventually come back to rebrief everything  
19       with you. That's the definition of prejudice.

20               THE COURT: Actually, no, not under the cases.  
21       That's not prejudice.

22               MR. MASTRO: Your Honor, I think that's  
23       absolutely prejudice. Let me be clear. There are  
24       multiple cases that have held -- First Department cases  
25       that have held not only should you dismiss the case, but

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1           you should grant discontinuance with prejudice. I'm  
2           talking, your Honor, about the NBN case. I'm talking  
3           about the McNamara case. Under very much these  
4           circumstances where these folks have a motion to dismiss,  
5           they want to choose a new forum, because they don't like  
6           how things have been going, they have parallel or related  
7           cases pending elsewhere, and then they come before you and  
8           say, let me have a voluntary dismissal without prejudice,  
9           and the First Department has ruled in the NBN case and in  
10          the McNamara case as well as the Jericho case, your Honor,  
11          the First Department ruled that, in fact, the case should  
12          be dismissed with prejudice either as a voluntary  
13          dismissal with prejudice or otherwise, and your Honor, the  
14          language has been crystal clear, because I know Mr.  
15          Clayton has tried to pigeon hole it into the language of  
16          Eugenia. This is only about, you know, about an issue of  
17          prejudice in a case factually so dissimilar from ours,  
18          because so little had happened in that case compared to  
19          the burdens that all parties, including the Court, have  
20          had to assume in this case, and your Honor, I simply point  
21          out the exact language, the exact language that the First  
22          Department has used in both of those cases that I just  
23          cited to you. The exact language used was, quote, "Courts  
24          properly discontinue" -- this is NBN Broad -- "where a  
25          motion for summary judgment was pending, but not yet even

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1 fully submitted."

2 THE COURT: I'm sorry. Motion for summary  
3 judgment. That is such a big difference between a motion  
4 to dismiss and a motion for summary judgment. They were  
5 much further along. I'll tell you something else, Mr.  
6 Mastro, there's a case up in I think it was the Fourth  
7 Department, Harris, that says that they don't even need  
8 the Court's permission, because filing a motion to dismiss  
9 is not a pleading.

10 MR. MASTRO: Actually, your Honor, I'm talking  
11 First Department which is where we are.

12 THE COURT: You know what. There was a case in  
13 the First Department, Judge Singh's case, where he got  
14 reversed in 2014, but, you know, there's a more recent  
15 case in 2019, and Judge Singh is actually on the panel.

16 MR. MASTRO: Well, your Honor, I refer you to  
17 McNamara versus McNamara. That was a motion to dismiss,  
18 not yet fully submitted and decided, 62 AD3d 619, 620.  
19 That's a First Department 2009 case.

20 THE COURT: The case I'm referring to is a 2019  
21 case.

22 MR. MASTRO: I understand. I'm sure they are  
23 both good law. It may depend on their facts. McNamara is  
24 surprising, strikingly similar to this case. A motion to  
25 dismiss pending, McNamara brings parallel cases elsewhere,

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1 is trying to get away from that court before that motion  
2 is decided, and the First Department, you know, altered  
3 the discontinuance without prejudice.

4 THE COURT: The other problem with your  
5 argument, Mr. Mastro, is that I could grant your motion to  
6 dismiss, and then they would still have an opportunity to  
7 replead.

8 MR. MASTRO: Your Honor, the fascinating thing  
9 about this is that they have taken all this time, and I  
10 heard all these arguments before that were made that the  
11 Paul Weiss firm needed more time to study the final deal  
12 documents. By the way, the key document they received,  
13 they say they received two documents, they received in  
14 June --

15 THE COURT: The term sheet.

16 MR. MASTRO: Not the term sheet. After the deal  
17 closed, they received the final deal documents. They have  
18 had those for months. That's one of the two documents  
19 they received since the preliminary injunction. All  
20 right. And, your Honor, they have had those documents for  
21 months. They told you before they needed more time to  
22 study them. Now they tell you that, you know, having  
23 received that document, okay, they have all these -- they  
24 have all of these new facts that they are ready to go with  
25 when they say they only received two documents. Your



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1 Honor, they've had the final deal documents. They tell  
2 you, we're going to make some wonderful new arguments.  
3 All right. Yet, they waited and sat on their hands in the  
4 hope of getting a federal ruling before you have a chance  
5 to decide a motion to dismiss on whatever amendment they  
6 did, and I suggest to your Honor that in that sense this  
7 is very similar to cases like McNamara and Lui and Baltia  
8 (phonetic) where there were attempts to get away from a  
9 judge thinking that a judge was not inclined in their  
10 direction. He sat there for five months not having  
11 amended, all right, and now he comes to you and tells you  
12 he has all of these great arguments. There are no great  
13 arguments, your Honor. The deal documents speak for  
14 themselves as they spoke for themselves at the preliminary  
15 injunction motion phase, and they are not going to be able  
16 to establish any claims, but they are the ones who really  
17 sat on their rights, stringing out this Court and their  
18 adversaries to force us to litigate in federal court first  
19 before they are heard by this Court. It's wrong for you  
20 and us. It is prejudice, and in the McNamara court, the  
21 First Department said that the discontinuance was, quote,  
22 "to avoid an adverse decision on a pending motion to  
23 dismiss the complaint with prejudice and to enable the  
24 plaintiff to raise the claim she makes herein in another  
25 pending motion" that that is prejudice. That is wrong and

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1 your Honor shouldn't tolerate that, and in McNamara versus  
2 McNamara, they changed the discontinuance to one with  
3 prejudice on appeal.

4 So, your Honor, I respectfully suggest that we  
5 have a situation where gamesmanship has been used seeking  
6 a discontinuance without prejudice that has damaged us,  
7 that has caused us and this Court to have to litigate an  
8 issue that now Mr. Clayton is here arguing, basically, oh,  
9 let me amend now, let me amend, and you know, then we'll  
10 do motion practice, and by then he will have achieved his  
11 sharp practice strategic objective of getting this strung  
12 out until after the federal decision and the hearing in  
13 January of 2021.

14 THE COURT: You know, the other problem, Mr.  
15 Mastro, is you give me too much credit for being able to  
16 get a decision out more quickly than a federal judge when  
17 my staff is cut. I have 440 cases. Meanwhile, I did get  
18 the injunction decision out as quickly as humanly  
19 possible, because it was an injunction. You know,  
20 unfortunately, things are slowing down here in the court;  
21 so as a matter of reality is that it's unlikely you would  
22 have gotten a decision before the federal action  
23 progressed anyway. So there, too, I'm not seeing  
24 prejudice.

25 MR. MASTRO: Your Honor, I would say this. I

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1 give your Honor all the credit your Honor is due. You  
2 have been exemplary on this case in terms of work ethic,  
3 diligence. Paul Weiss created this problem for you. We  
4 had to go through fire drill after fire drill over those  
5 initial weeks, and then Paul Weiss said, oh, we don't like  
6 the preliminary injunction; let's slow everything down,  
7 and we'll try to do a discontinuance after he had moved to  
8 dismiss. Your Honor, we moved to dismiss in July, early  
9 July, and your Honor, yes, had we just proceeded at pace,  
10 I don't have any doubt given how familiar your Honor had  
11 become with that record, and how well you had reviewed  
12 those deal documents, which were plain on their face that  
13 Paul Weiss' clients have no claim, you would have decided  
14 this motion by now.

15 THE COURT: Well, I haven't seen the deal  
16 documents yet. I've only seen the term sheet. Thank you  
17 very much. I'm going to see if anyone else wants to speak  
18 in addition to Mr. Mastro.

19 MR. LENDER: Your Honor, this is David Lender  
20 from Weil Gotshal. I won't repeat the arguments that Mr.  
21 Mastro made. I will say that I think he miscited the  
22 case. The case is called McMahan, McMahan versus McMahan,  
23 but as Mr. Mastro said, both Lui, McMahan, both First  
24 Department cases where the issue was a motion to dismiss,  
25 and the First Department denied a motion to discontinue,

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1 because it concluded that, essentially, the plaintiff was  
2 trying to avoid a potential adverse ruling on a pending  
3 motion to dismiss analogous to here. The only other point  
4 I would like to add, your Honor, is if you're inclined to  
5 grant the motion, we would respectfully request that you  
6 award attorneys' fees and costs. It's interesting because  
7 the leading cases that Paul Weiss cited in their brief,  
8 both American Transit and Shamansky (phonetic), in both of  
9 those cases -- there was no issue about trying to avoid an  
10 adverse decision on the merits. That wasn't part of the  
11 decisions, but in both of those cases, American Transit,  
12 here's a quote from that, where they said "Any prejudice  
13 to the defendants was properly obviated by awarding costs  
14 and attorney fees to the defendants to compensate for the  
15 time expended in the defense of the action to date."  
16 That's one of Paul Weiss' cases. Same thing Shamansky  
17 (phonetic). We also cited -- both of those are not in the  
18 First Department. We also cited the Beagle (phonetic)  
19 case from the First Department, Carter from the First  
20 Department, and the reason I say that, your Honor, is if  
21 you're not going to grant the motion because of the  
22 prejudice, which is basically avoiding a potential adverse  
23 ruling, the timing here is important. Right. They waited  
24 until after we filed our motion to dismiss, after LCM  
25 walked away from you and filed in federal court. Those

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1 are costs that we would not have incurred, and under  
2 3217(b) your Honor is permitted to grant a motion to  
3 discontinue upon any terms and conditions you deem proper.  
4 Again, literally, the cases that Paul Weiss cites in their  
5 brief to support their motion they granted fees to the  
6 defendants in both of those cases. We wanted your  
7 Honor --

8 THE COURT: You know, the problem with that  
9 argument, Mr. Lender, is that we would have had and you  
10 would have had to oppose a preliminary injunction motion  
11 no matter what; so --

12 MR. LENDER: But not the motion to dismiss costs  
13 here. If they would have filed their motion to  
14 discontinue timely --

15 THE COURT: In most of my 440 cases, we get  
16 motions to dismiss and plaintiffs filing amended  
17 complaints all the time. This is no different than anyone  
18 of the other cases.

19 MR. LENDER: It's only different here, because  
20 of the issue of the timing, right, in the sense of the  
21 arguments that we've made about trying to forum shop,  
22 judge shop, avoid --

23 THE COURT: I don't buy those, though. That's  
24 the problem. So, Mr. Clayton, do you have anything else  
25 you want to say?

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1 MR. CLAYTON: Very, very briefly, your Honor.  
2 No. 1, as we said in our papers, as I said in my argument,  
3 if this case is refiled, we will do what we can to get it  
4 back to you. I have not looked at what Mr. Mastro cited.  
5 It's not cited --

6 THE COURT: He's right. He's right. It's only  
7 related if there's a pending action, which is true, but --

8 MR. CLAYTON: I think there will be a way, your  
9 Honor; so --

10 THE COURT: That would be up to the  
11 administrative judge.

12 MR. CLAYTON: All I can say is that we will  
13 cooperate in that way. No. 2, Mr. Mastro during his  
14 presentation seems to spin off alternative facts. So, for  
15 example, he said again and again, we delayed, we sat on  
16 our hands. I say it again, and he agreed with it. First  
17 he agrees with it, and then he contradicts it. We filed  
18 the motion 29 days after we filed the complaint. I can't  
19 sit on my hands that quickly, I have to say, and in  
20 addition, he said, to kind of imply, I suppose, that we  
21 set up the federal case. He used words like, if my notes  
22 are correct, he called the federal court clients a  
23 surrogate litigant for us. There's no basis for any of  
24 that, nothing anywhere that he cites, not so, and what  
25 he's trying to do is he's trying to make this a different

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1 kind of case. It would be a case in which they could  
2 argue forum shopping had we filed the case in federal  
3 court. We did not. Finally, your Honor, and then I will  
4 stop, on the attorney fees, attorney fees are quite  
5 extraordinary in cases of this kind, and as your Honor  
6 said, they would have had to defend the preliminary  
7 injunction. They made a motion to dismiss our current  
8 pleading. That motion will be -- if this case continues,  
9 that motion will be superseded. It's no different, as  
10 your Honor said, from lots and lots of cases in this  
11 court. Thank you for your time.

12 THE COURT: I see you, Mr. Mastro. What would  
13 you like to say?

14 MR. MASTRO: I'll be brief.

15 THE COURT: Mr. Lender and Mr. Clayton, turn off  
16 your microphone.

17 MR. MASTRO: Thank you, your Honor. What I  
18 meant by delay, your Honor, is the motion may have been  
19 timely brought, but we have had extensions, extensions  
20 granted to Paul Weiss, because of Mr. Clayton's or other  
21 schedules. Your Honor, I want to be very clear. I think  
22 the correct disposition of this is that if they want a  
23 voluntary dismissal it should be with prejudice, but your  
24 Honor, he's saying that he's going to bring it back before  
25 you. The only way to guarantee that is to keep the case

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1 on. I will tell you this. We moved to deny the voluntary  
2 discontinuance without prejudice or alternatively to have  
3 it, you know, granted with prejudice. You should deny  
4 this motion. We should be going forward before your  
5 Honor. This should not be about gamesmanship of who is  
6 working with who on the federal side. This is a real live  
7 case where we have a motion pending. If he's got an  
8 amendment, show your cards, Mr. Clayton. Don't tell us  
9 five months later that you finally analyzed the deal  
10 documents and you think you have some new argument. It's  
11 not going to be there. There's no there there. Show your  
12 cards, make your amendment, and we'll bring on our motion  
13 here before your Honor and get this case resolved. That's  
14 the correct disposition here. He has not made the case  
15 for a voluntarily dismissal, and whether your Honor buys  
16 forum shopping or not, there are a lot of things that  
17 smell about this whole situation. They have not made the  
18 case for a voluntary dismissal without prejudice. They  
19 have clearly had, as Mr. Clayton admitted, a design on  
20 having the federal case decided before your case, and  
21 therefore, you should deny this, and let us get on with  
22 our motion which is we made our motion. Let it go. Let  
23 him amend if he wants to amend. Let us go. The only way  
24 your Honor can keep the case for sure is to do that, and  
25 we want the cases to be decided here and now. Thank



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1           you.

2                       THE COURT: All right.

3                       MR. CLAYTON: Your Honor, just one moment, if I  
4           may. That's a misstatement of the governing law, but,  
5           again, Mr. Mastro says we had extension after extension at  
6           Mr. Clayton's request. There was one extension that I  
7           requested, because the date that was set which was in  
8           mid-November I was supposed to be in an expedited trial in  
9           Detroit, and I asked for professional courtesy to do that.  
10          It was granted and that was the one extension. Again,  
11          alternative facts are not allowed in court, maybe in  
12          political discourse in the United States, but not here.

13                      THE COURT: All right. Thank you very much.  
14          It's 3:17 and I have another case on at 3:30, and so I'm  
15          going to make a decision on the record and direct that you  
16          get the transcript. The motion is granted. I am going to  
17          provide that if the action is refiled in this court that  
18          it be re-assigned to me which I think addresses the  
19          defendants' concern about forum shopping which I don't  
20          actually agree with, but I think it addresses that  
21          concern. The standard under 3217(b) is prejudice to  
22          defendants, and I just have not heard such prejudice, and  
23          instead, the defendants have been asking the Court to  
24          scrutinize the plaintiffs' motives, and in fact, that was  
25          Mr. Mastro's last closing argument, that they haven't made

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1 the case, the plaintiffs haven't made the case. Well,  
2 scrutinizing the plaintiffs' motive is actually not the  
3 appropriate analysis at that point. Later on in the case  
4 the scrutiny of the plaintiffs' motive increases as the  
5 case progresses, but here I have a motion that was filed  
6 30 days after the case was initiated. The case was  
7 initiated to stop a transaction. So the timing was not  
8 actually within the plaintiffs' hands in this case. In  
9 other cases where I've had requests to stay or requests  
10 to -- mostly requests to stay it's been because the  
11 consideration for the Court was that the timing had been  
12 selected by the plaintiff, and that's just not the case  
13 here. The plaintiff was in a position to have to move  
14 very quickly, because of the timing of the deal, and so  
15 that's one of the reasons I think that they get to make  
16 this motion, and one of the reasons I'm granting it. You  
17 know, as I said before, there's a conflict in the First  
18 Department between 315 West Enterprises, a 2019 case, 171  
19 AD3d 466, and EDO USA LLP, a 2014 case, 113 AD3d 507,  
20 2014, also First Department, about whether they even have  
21 to get the permission of the court when a motion to  
22 dismiss has been filed. I will put in the order that it  
23 should be, you know, re-assigned to the Court. I am not  
24 granting the request for attorneys' fees and costs,  
25 because as I said, it's not like you would have avoided --

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1           you would have had this cost no matter what, whether the  
2           Court grants this motion or not. In fact, it's  
3           inconsistent to be asking for the attorneys' fees when  
4           you're simultaneously arguing for the Court to continue  
5           the case in which case you certainly wouldn't be entitled  
6           to the attorneys' fees. Finally, one of the arguments  
7           about prejudice, the Court granting the motion but with  
8           prejudice, and I'm denying that request as well, because  
9           New York favors decisions on the merits, and as I said,  
10          during the arguments, and I will sign the transcript, but  
11          even if the motion to dismiss had gone forward, and if the  
12          motion to dismiss or motions to dismiss had been granted,  
13          the plaintiff could still amend after that, so, again, not  
14          prejudice. So for all of those reasons, and based on your  
15          excellent argument -- let me just add, in terms of the  
16          reliance on Jericho, okay, Jericho not persuasive as in  
17          that case it was the third action. It's just the timing  
18          here, 30 days after filing the complaint, versus there  
19          being the third action that had been filed by the  
20          plaintiff. McMahan, M-c-m-a-h-a-n, I don't know how you  
21          pronounce that correctly, to be honest with you, but same  
22          thing, untimely. It was seven months after commencing the  
23          action, and Lui, L-u-i, against CPC, the plaintiff had  
24          already amended the complaint once. So for all of those  
25          reasons, the motion is granted, and I thank you all. So

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1 nice to see you, and Mr. Court Reporter, we have seven  
2 minutes till the next case. So have a nice evening,  
3 everyone. Take good care, and I'm sure I'll see you in  
4 one way or the other soon.

5 MR. CLAYTON: Thank you, your Honor.

6 THE COURT: Please, Mr. Clayton, you're going to  
7 get the transcript. Okay?

8 MR. CLAYTON: Yes, we will.

9 THE COURT: Thank you.

10 3:24 p.m.

11 (End of proceedings.)

12  
13  
14 It is hereby certified that the foregoing is a true and  
15 accurate transcript of the proceedings.

16  
17  
18   
19 William Cardenuto  
20 Senior Court Reporter  
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23  
24  
25